**Amalgamated Transit Union, Local Union No. 1433 (Phoenix Transit System) *and* Samuel Williams.** Case 28–CB–5097

September 24, 2001

## DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

On June 22, 2001, Administrative Law Judge Burton Litvack issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

## ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Dated, Washington, D.C. September 24, 2001

Peter J. Hurtgen, Chairman

John C. Truesdale, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Sandra Lyons, Esq.*, for the General Counsel.
*Michael J. Keenan, Esq.*, of Phoenix, Arizona, for the Respondent.
*Samuel Williams*, of Phoenix, Arizona, appearing pro se.

## DECISION

### STATEMENT OF THE CASE

The original and first amended unfair labor practice charge in the above-captioned matter were filed by Samuel Williams, an individual, on March 17 and March 30, 1999, respectively, and, based on said unfair labor practice charge, an amended complaint was issued by the Regional Director of Region 28 of the National Labor Relations Board, herein called the Board, on June 13, 2000. The amended complaint alleges that Amalgamated Transit Union, Local Union No. 1433, herein called Respondent, engaged in, and is continuing to engage in, acts and conduct violative of Section 8(b)(2) of the National Labor Relations Act, herein called the Act, and Section 8(b)(1)(A) of the Act. Respondent timely filed an answer, essentially denying the commission of the alleged unfair labor practices and affirmatively asserting that said alleged unfair labor practice allegations were time-barred by Section 10(b) of the Act. Pursuant to a notice of hearing, the above-described unfair labor practice allegations were litigated at a trial before the below-named administrative law judge in Phoenix, Arizona, on July 11 through 13, 2000. At the trial, all parties were afforded the rights to examine and to cross-examine witnesses, to offer into the record all relevant documentary evidence,[1] to argue their legal positions orally, and to file post-hearing briefs. Counsel for the General Counsel, counsel for Respondent, and Williams each filed a post-hearing brief, and each document has been carefully considered. Accordingly, based on the entire record

[1] The Respondent has filed a motion to strike the Charging Party's exceptions on the ground that they do not meet the requirements of Sec. 102.46(b) of the Board's Rules. Although the Charging Party's exceptions do not comply in all respects with the Board's Rules, we find that they are not so deficient as to warrant striking, particularly in light of the Charging Party's pro se status.

[2] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's conclusion that the complaint is barred by Sec. 10(b) of the Act, we particularly rely on the finding that, no later than September 11, 1998, the Charging Party was on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred, i.e., that the Respondent was the party who supplied the Employer with the information about his criminal history which directly resulted in his discharge. Indeed, the Charging Party said that he had a "gut" belief that this was so.

We do not pass on the judge's discussion of "fraudulent concealment," as that issue is not presented by the Charging Party's exceptions.

[1] Counsel for Respondent offers into the record R. Exhs. 22(a) through (e), which are certified copies of documents relating to Williams' conviction, prison sentence, time served in prison, release from prison, and parole in the State of Oregon. Counsel for the General Counsel objects to receipt of said documents on grounds that the documents do not constitute Williams' entire Oregon Department of Corrections file and should not be considered a complete record. Of course, if there are other records, counsel for the General Counsel has had ample opportunity to obtain certified copies and to offer them so as to make a "complete" record of the Charging Parities' incarceration. She has not done so, and I shall not assume that what counsel for Respondent has offered is not a complete record. Counsel for the General Counsel's objection is overruled, and I shall receive R. Exhs. 22(a) through (e) and make them part of the record herein.

herein,[2] including the post-hearing briefs and my observations of the testimonial demeanor of each of the witnesses, I issue the following.

## FINDINGS OF FACT

### I. JURISDICTION

Respondent admits that, at all times material, Phoenix Transit System, herein called PTS, a corporation duly organized, and existing by virtue of, the laws of the State of Arizona, maintains an office and place of business in Phoenix, Arizona where it is engaged in the intrastate transportation of passengers in and around the Phoenix metropolitan area. Respondent further admits that, during the 12-month period ending March 17, 1999, in the normal course and conduct of its business operations described above, PTS derived gross revenues in excess of $250,000 and purchased goods, products, and materials, valued in excess of $50,000, directly from suppliers located outside the State of Arizona. Finally, Respondent admits that PTS is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. LABOR ORGANIZATION

Respondent admits that, at all times material, it has been a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ISSUES

The amended complaint alleges that Respondent engaged in acts and conduct violative of Section 8(b)(2) of the Act and Section 8(b)(1)(A) of the Act by supplying information to PTS which information resulted in PTS's discharge of its employee, Samuel Williams , and by urging PTS to intensify its efforts to locate information that would have an adverse effect on Williams' employment status because Williams did not support incumbent officials of Respondent and engaged in dissident internal union activities and/or for other arbitrary or discriminatory reasons—reasons other than Williams' failure to render uniformly required initiation fees and periodic dues. Respondent denied that its officers and/or agents engaged in any of the above-described acts and conduct and affirmatively asserts that said acts and conduct occurred more than 6 months prior to the filing of the original unfair labor practice charge here and were, therefore, outside the 6-month statute of limitations period established by Section 10(b) of the Act.

### IV. THE ALLEGED UNFAIR LABOR PRACTICES

#### *A. The Facts*

Respondent and PTS, which provides bus transportation for riders in and around the Phoenix, Arizona metropolitan area, have had a long-standing collective-bargaining relationship since the 1960's, with Respondent acting as the collective-bargaining representative of PTS's bus operators. At all times material, from on or about October 30, 1997, Francis Mullennix, who works for PTS as an operator, has been the president/business agent of Respondent.[3] Charles Weigand, who worked as an operator for PTS until his termination in April 1998, was the financial secretary/treasurer of Respondent from on or about October 30, through, at least, December 1998;[4] at all times material, Richard V. Young, an operator for PTS, has been the recording secretary of Respondent; and, at all times material, Joe Mickelson, an operator for PTS, has been a shop steward for Respondent and has temporarily served as Respondent's presenter before the accident review board and as the labor organization's acting financial secretary/treasurer after Weigand was removed from office.[5] Ronald Norton, who previously had been its assistant general manager for strategic services, became the general manager of PTS in late July or early August 1998; at all times material, Philip Hanley has been its assistant general manager for passenger services; and, at all times material, David Martin has been the chief of transit public safety for PTS.

Alleged discriminatee, Samuel Williams, was employed by PTS as a bus operator from 1991 through his discharge on September 4, 1998. Williams became a member of Respondent shortly after being hired by PTS. In 1996, he was appointed a shop steward by Respondent, and, in January 1997, he was elected to the office of vice-president of the labor organization. At the time, Don Collins was the incumbent president/business agent of Respondent, and, as stated above, Mullennix was its financial secretary/treasurer.[6] In approximately August 1997, Collins informed Mullennix and Walter Fuller, an operator for PTS and a member of Respondent's executive board in 1997, that he intended to resign imminently as Respondent's president/business agent. Aware that, pursuant to the labor organization's bylaws, Williams would then become acting president/business agent pending a special election for the selection of a successor to Collins and harboring an intense antipathy for

[2] I grant counsel for the General Counsel's motion to correct the record.

[3] Mullennix's current position in Respondent is the only full-time position in the labor organization, and PTS gives the office holder a leave of absence to perform the position's assigned duties. Before being elected to her current position by Respondent's membership, Mullennix had been the financial secretary/treasurer of Respondent.

[4] Prior to being elected by Respondent's membership to the position of financial secretary/treasurer, Weigand had been the editor of the labor organization's membership newsletter. In April 1998, after he published articles in the newsletter concerning alleged sexual harassment of employees by two PTS managers, PTS discharged him. Over the opposition of several members of the labor organization, including Samuel Williams, Respondent did not remove Weigand from his elected position; eventually, the president of the Amalgamated Transit Union permitted him to remain in his elected position pending the resolution of legal proceedings regarding his termination. Then, on or about December 15, 1998, Weigand sent a document to Williams, G.C. Exh. 7, which document formed the basis of the underlying unfair labor practice charges. As a result of what Weigand sent to Williams, Mullennix filed internal charges against Weigand, and he was subsequently removed from his position as financial secretary/treasurer of Respondent.

[5] Respondent admits that Mullennix is its agent within the meaning of the Act, and, while admitting that Mickelson was its limited agent while performing his shop steward duties, denies that he was its agent for any other purpose.

[6] Apparently, Collins, Williams, and Mullennix were to serve in their respective positions until 2001.

Williams,[7] Mullennix wanted Fuller to become a candidate for the president/business agent position. According to Fuller, on, at least, two occasions in late August or early September, Mullennix and Collins spoke to him, and "they just encouraged me. They said they would like me to run for president." However, as he was not familiar with the duties and responsibilities of the position and had no desire to ". . . be learning at someone else's expense," Fuller explained to Mullennix his reluctance to seek the position. She responded ". . . that she didn't want [Williams] to run for president and win . . . . And then when I refused to run for office . . . she decided . . . she would have to . . . run for the office of president."[8] Fuller added that Mullennix expressed several reasons why she did not want Williams to become Respondent's president/business agent. First, she averred that ". . . he didn't have a middle name," a reason "which made no sense" to Fuller. Then, "she said . . . there was some criminal background but she didn't have proof of it at the time." On the latter point, in mid-September, Mullennix told Fuller ". . . she would do what she had to do to stop Sam from running . . . ," and she said that ". . . she didn't even feel he should be allowed to drive a city bus . . . and if she was to get the proof she was looking for, she would turn it over to the company and if the company wouldn't fire him, then she would go to . . . the press . . . to put pressure on the company to terminate his employment."[9] Mullennix testified that Don Collins initially "put forth" Fuller's name as a candidate for president/business agent and that she did tell Fuller she would support him but denied she attempted to convince Fuller to run for the position.

The matter of Williams' "criminal background" was a significant factor underlying the events surrounding Respondent's alleged unfair labor practices and the acts and conduct of PTS. In this regard, there is no dispute that Williams was arrested for and, in October 1981, convicted of robbery in the third degree, sodomy in the first degree, and sexual abuse in the first degree in Portland Oregon; that he was sentenced to 20 years in prison for the sodomy and the sexual abuse convictions and to five years in prison for the robbery conviction, with the sentences to run concurrently; that he began serving his prison sentence in the Oregon State Penitentiary on October 9, 1981; that he was paroled from the Oregon State Penitentiary on September 4, 1984; and that, on September 4, 1985, the State of Oregon discharged Williams from his sentence and parole. Further, while there is no record evidence substantiating his testimony,[10] Williams asserted that, having been given a work release, he actually was incarcerated for just 13 months in the Oregon State Penitentiary and that, when he was paroled, he was, in fact, already living and working in the Portland, Oregon area. Moreover, subsequent to being elected to the position of vice-president of Respondent, Williams appears to have displayed little reticence in informing people of his criminal background. Thus, Patricia Morton, Respondent's office manager, testified that, in either August or September 1997, Williams told her ". . . that he had been convicted of a felony and he discussed with me the whole nature of how it came about and what happened. . . . He did say it was rape." As a result, she immediately approached Don Collins, told him what Williams said, ". . . and I asked . . . not [to be] left alone in a room with [him]."[11] Also, according to Claudia McDonald, an operator for PTS, at approximately the same time, she overheard a conversation between Williams and other operators in the dispatch room at Respondent's north Phoenix facility. "I was walking in and what caught my attention was the fact that Sam stated that the union was trying to push him out." She then heard Williams say ". . . that he had done jail time. He said that he had done jail time for rape but that he wasn't guilty of it."[12] Finally, Charles Weigand testified that, in October, he began hearing "scuttlebutt" that Williams had a past criminal conviction, and Williams himself admitted informing Collins about his criminal conviction.

Don Collins submitted his resignation as Respondent's president/business agent on October 15, 1997. That night, Mullennix, who testified she first learned about Williams' prior felony conviction on October 14, when Collins informed her "about the issues with Sam . . . ,"[13] telephoned Williams and, according to the latter, ". . . told me that I could not hold office. That . . . [29 U.S.C. Sec. 504] . . . said . . . because of my felony, I was ineligible to hold office. . . . She told me that [she, R.V. Young, and I] would meet down in the office the next morning

[7] Mullennix conceded she informed other officers and members that she neither liked nor trusted Williams and testified, during cross-examination by Respondent's counsel, that, among other matters, her aversion for Williams resulted from a confrontation with him in January 1997, concerning whether he was entitled to reimbursement by Respondent for time spent on business for the latter.

[8] Pursuant to Respondent's bylaws, given a vacancy in the office of president/business agent, if the vice-president declined to assume the position, the financial secretary/treasurer would be next in line to assume the position.

[9] During direct examination, asked if he ever spoke to Mullennix again after their October 1997 argument, Fuller stated that they spoke "very rarely" because he hardly ever saw her. Then, one night in April 1998, she telephoned Fuller at home and yelled that he (Fuller) could not be trusted and had no right to representation. Shown G.C. Exh. 10, a one page document, termed a "letter" and signed by "Walt," Fuller deemed it a "fabricated document." According to him, the document had been posted in the period preceding the October 30, 1997 election, and "no less than three people" told him that it was written by Mullennix and Patricia Morton and that the former asked them to circulate it. Further, he believes that Mullennix made threatening telephone calls to his wife.

[10] In certifying R. Exhs. 23(a) through (e), the Oregon State Department of Corrections records for Williams, the custodian of records stated that such "are the true and correct copies" of the state's records for Williams, and nothing there reveals that Williams was released early from prison on a work release program.

[11] Possibly influencing Morton was an incident with Williams a few months earlier. She testified, "It had to have been late spring . . . because I was in shorts. . . . Mr. Williams [said] to me that I had nice legs and that he wouldn't mind them wrapped around his."

Williams admitted informing Morton about his felony and failed to deny his alleged comment to Morton about her legs.

[12] McDonald also testified that later in the evening, she informed Mullennix about what she heard.

[13] Walter Fuller contradicted Mullennix, testifying that he first learned of Williams' felony conviction during a telephone conversation with Mullennix ". . . in the vicinity of September, October of 1997. . . . prior to Mr. Collins' retirement."

morning and discuss it."[14] While [Mullennix] asked Young to attend the meeting, according to Young, she only mentioned the existence of "a problem with Sam Williams" but failed to elaborate.[15] According to the alleged discriminatee, he met with Mullennix and Young at Respondent's office at 8 a.m. the next morning. "Fran proceeded to tell me that it was against the law for me to hold office. . . . because of my felony conviction. . . . Therefore, I had to resign. And that if I did not resign right now . . . she would call [an] executive board meeting and throw me out of office."[16] According to Williams, he responded "that . . . I didn't understand . . . that [the] conviction was . . . 17 years old and that I didn't understand exactly what was going on. [Mullennix] was insistent . . . pounding on the desk, she had paper and pencil right there and shoving it . . . under me telling me that I could resign. . . . I told her that I didn't want to resign at that time. . . . R.V. Young interjected," saying "I couldn't hold office. They both, again, constantly told me I had to resign;" Young said that Williams did not want to be "embarrassed by this;" and ". . . Fran told me again that if I didn't resign . . . she would call an executive board meeting and she would have me thrown out of office." Then, Young ". . . suggested that what I could do was resign and that, since everybody was aware of my . . . diabetes . . . I could use that as an excuse to resign from my office." At this point, believing he could not legally hold office in the labor organization and having no desire to fight a lost cause, Williams wrote and signed a resignation note,[17] which Mullennix and Young witnessed by placing their initials, the time, and the date on the document.[18]

Recalling an entirely different version of the meeting, R.V. Young testified that he was the first to arrive at Respondent's office and that Williams the next to arrive. With just the two of them present, Williams began telling him about a past "problem" involving "a felony," and ". . . he said, `Well, I don't think I'm supposed to be running for office or be in office.'" Young, who stated he knew nothing about the legal issues, asked Williams what he wanted to do, "and he stated that he had no intention of running for office in the upcoming election. And he hoped that his private life could be kept private and I explained . . . that the best way . . . to keep it private would be to resign [his office] . . . . And . . . we both agreed that would be the best solution." At approximately this point, according to Young, Don Collins walked into the office, sat down, but said nothing.[19] Young and Williams then discussed whether the latter should resign "under personal reasons or medical reasons and I explained to Sam that most of the people knew [he was a diabetic] . . . . So I said if you resign under health problems it shouldn't surprise anybody." Williams then wrote and signed his resignation note. Uncertain whether Mullennix was present when Williams drafted his note; however, when she arrived, "I asked [her] to sign it as a witness so there would be three signatures on there." Mullennix recalled that she was "very late" arriving for the meeting and also recalled that Collins was present in the office. According to her, ". . . Young had already discussed everything with Sam and I didn't feel it was a proper forum to discuss it anyway. I believed we needed to call the executive board together, all the officers of the local, to deal with the issues." Therefore, ". . . the only statement I made to him, to R.V. and to Don Collins" at the meeting was ". . . I told him . . . that we needed to convene the executive board to deal with the issues at hand." Denying that she told Williams at the meeting he couldn't hold office in Respondent because of his past felony conviction, Mullennix[20] testified that, prior to her arrival, Williams told Young and Collins that "he had decided to resign his position" and that he had committed said decision to writing.[21] Mullennix, who became acting president/business agent as a result of Williams' resignation, explained that her only concern with Williams assuming that position was that, as an officer of Respondent, his ". . . name goes on our checking account and they have access to our funds. We are required to be bonded. That was my main concern."[22]

Williams went home after meeting with Mullennix and Young, researched the law, and discovered that the federal prohibition against him holding office in a labor organization remained in effect for only 13 years after his prison term. He discussed the matter with his wife and telephoned Respondent's office. He spoke to Mullennix and ". . . told her that I had read the law and that . . . the statute only was enforceable for 13 years and that I was legally in office and I wanted to be rein-

[14] Mullennix's version of this conversation is virtually identical that of Williams—that, during the conversation, "Sam and I discussed" whether his conviction barred him from holding office in the labor organization. "I said we needed to discuss it."

[15] According to Young, he telephoned Williams, who also said there was a "problem" but did not explain what it was. There is no dispute that Mullennix failed to inform any other member of Respondent's executive board about this meeting.

[16] 29 U.S.C. Sec. 504 provides that "no person who has been . . . convicted of, or served any part of a prison term resulting form his conviction of, robbery . . . shall serve or be permitted to serve . . . as an officer . . . of any labor organization . . . during or for the period of thirteen years after such conviction or after the period of such imprisonment, whichever is later . . . ."

[17] Williams gave "health reasons" as the explanation for his resignation.

[18] Young and Mullennix wrote the time as 9:00a.m..

[19] Williams denied that Collins was present during any part of the meeting.

[20] Mullennix testified that she knew that Williams was going to resign his position prior to their telephone conversation during the evening of October 15. According to her, on either October 13 or 14, ". . . he . . . called and told me he was going to resign and that's why I asked Don what's going on. . . . I asked him why. . . . He told me he had gotten a large settlement from Fry's Grocery Store, that he was going to open his own computer business and he would not have time to take care of the business of the Union . . . . it's what prompted me to ask Mr. Collins what was going on . . . ."

[21] Walter Fuller testified that he spoke to Mullennix about the circumstances of Williams' resignation and that Mullennix told him about her meeting with Young and Williams. According to Fuller, he objected to the entire process, arguing that the entire executive board should have been present. Mullennix responded by making excuses, saying most members were working and the meeting had been "quickly thrown together."

[22] Mullennix contradicted herself, stating that, as an officer, Williams would have been subject to bonding in January 1997; that, in January, she had sent a list of the labor organization's officers to the International for bonding; and that she had never been informed that a bonding problem existed with Williams.

stated as vice-president." Mullennix suggested that Williams come again to Respondent's office, and he did so. There, he spoke to Mullennix and Young and explained that the federal prohibition from holding office lasted only for 13 years. Williams said that he had been forced out of office "unlawfully" and demanded that he be permitted to rescind his resignation from office. To this, Young said he had no authority to do what Williams wanted and suggested that Respondent call an immediate executive board meeting in order to discuss and decide the matter. An executive board meeting was held 4 days later—on October 20. During said meeting, Williams told the board members that Mullennix and Young had coerced him into resigning, saying that as he had been convicted of a felony, he could not hold office in the labor organization; that they had given him a choice, either resign or be brought up on charges and be thrown out; that he had learned the prohibition against holding office lasts for just 13 years; and that he wanted to be reinstated as vice president. With regard to his imprisonment in Oregon, Williams told the executive board that he ". . . did my fourteen months. I did 8 months in and 6 months on work release"[23] and that PTS was aware of his incarceration in the Oregon State Penitentiary.[24] Rather than make its own decision, the executive board decided to "table" the matter and ask the International president, Jim LaSala, to decide the matter. The next morning, October 21, Mullennix, Young, and Williams spoke to LaSala and explained the controversy to him. Subsequently, LaSala faxed his decision to Respondent—that Williams' resignation would be upheld but that he would be permitted to take part in the election for the purpose of selecting a successor to Don Collins. On October 30, the special election was held, and Mullennix was selected by the membership as the president/business agent of Respondent.[25]

From November 1997 through June 1998, Sam Williams attended none of Respondent's membership meetings and had little, if any, contact with its newly elected officers. In the latter regard, Charles Weigand testified that, after his termination by Respondent in April 1998, Williams telephoned him "at least twice" one day, opining him that he should no longer serve as financial secretary/treasurer because he had been discharged by PTS. Although Williams testified that, during the above time period, he did have "interactions" with other people during which he expressed his opinions on various subjects of interest to Respondent's, members, there is no record evidence of any contacts between him and Mullennix until July 1. On said date, a confrontation occurred between the two individuals. According to Williams, the incident occurred at PTS's south Phoenix facility inside the "pool" room in which several operators were congregated. He was going from the pool room into the adjacent TV room when Mullennix walked past him. With a "smirk" on her face, Mullennix said he would thereafter be working for $8.00 per hour, and Williams replied, ". . . `No, that's what you're going to do to the Union.'" Mullennix ". . . asked me how and I told her about the way I felt [the five-year collective-bargaining agreement] was structured. I told her that she was company person . . . and that she had better watch out because during the next election I would be running." According to Mullennix, "I was walking through the garage. I had heard from another operator that Mr. Williams was concerned that we were going to me making $8.00 an hour and as I walked through the garage Sam was standing there and I stopped to ask him why . . . he would think that . . . . and he . . . started screaming at me, called me a fucking bitch, `Get out of my face you fucking bitch,' and at the top of his lungs. I walked through the door into the pool area .. . . He followed me through there and . . . I was really angry over the language he was using . . . . And I turned around to him and I told him . . . That's enough, that is absolutely enough. . . . I'm not going to tolerate that kind of language and neither are the other people.' He continued to scream. He was right in my face and Roberta Hansen stepped in between us and pushed Sam away from me at which time I turned around and continued to the dispatch area." Roberta Hansen, an operator for PTS, recalled the incident as occurring during the summer of 1998. According to her, ". . . Fran and I were kind of walking through the [south garage] from the dispatch area towards the bulletin board area where our extra board is posted. . . . [People] were playing pool . . . . the adjacent room has a television . . . . We were standing in front of [the] bulletin boards and Sam came from another room . . . came up to Fran and started talking to her pretty loudly. It kind of escalated. . . . She was called a bitch a few times. But I . . . don't remember what the argument was about. The profanity stuck out. . . . Sam was the instigator . . . and I was slightly stunned. And then . . . . Fran did say something back to him. I believe he responded and I remember . . . . just saying `Sam, can it' . . . ." Hansen recalled that she "kind of walked towards" Williams and that "he stepped back and voices calmed down. . . ." She could not remember the substance of their argument. Williams could not recall using profanity during the confrontation, denied being angry and having to be separated from Mullennix, but "I may have raised my voice."

Ronald Norton testified that, probably on July 1,[26] prior to him becoming general manager of PTS, Fran Mullennix telephoned him regarding a "blow-up" with Sam Williams[27] and

[23] An executive board member, Daniel Corea, asked Williams to provide the board with records of his prison term in order to establish whether he had been out of prison for, at least, 13 years, and Williams agreed to obtain the records from the State of Oregon. At the hearing, Williams said he had not done so.

[24] During his cross-examination by Respondent's counsel, Williams stated that he was referring to the PTS human resources department, which, he believed, performed "police checks" on applicants. He conceded not telling any PTS official about his criminal record.

[25] Williams lost in the first round and did not participate in the run-off election.

[26] During direct examination, Norton initially placed this conversation as occurring on July 2; however, during cross-examination, after being shown the notations under July 6 on his "daytimer," on which ". . . when I'm on the phone I'll jot notes down real quick. . . ," Norton changed his testimony and became certain this conversation occurred on July 6. However, after being shown R. Exh. 17, discussed infra, Norton conceded that his initial conversation with Mullennix, regarding Williams, ". . . could have well been the 1st . . . ."

[27] There can be no question that Mullennix and others spoke to Norton with regard to Mullennix's confrontation with Williams. Thus, Norton recalled a face-to-face meeting with Mullennix during the

said "that he was a convicted felon and . . . what he was convicted of and that's about it . . . . she suggested that . . . we should go research and get the documentation that shows he's a felon."[28] Subsequently, Norton, who testified that the bargaining relationship between PTS and Respondent had been "absolutely excellent" through September 1999, passed the information along to Phil Hanley, PTS's assistant general manager for passenger services, which includes responsibility for transit security, to ascertain "if there was any truth" to what Mullennix alleged.[29] Norton further testified that, over the next several weeks, PTS was unable to discover any information, verifying or disputing Mullennix's assertions. Thereafter, in a series of telephone conversations, Norton continually told Mullennix "we can't find anything" and she continually "nudged me to keep digging because its out there."[30] According to Norton, he reacted as he did as it "hit me cold that we have somebody that was a convicted felon and . . . there was a little girl that he was supposed to [have made] some overtures to" and as "there might be liabilities out there."[31] While conceding that she did have conversations with Norton regarding passenger complaints against Sam Williams and other drivers, Fran Mullennix specifically denied having any conversations with Norton in July and August 1998, concerning allegations that Williams had been convicted of a felony.

Also in July, according to Joe Mickelson, a shop steward for Respondent who occasionally investigated "some matters" for Respondent, Mullennix asked him "to facilitate a background investigation" of Samuel Williams.[32] She told him "that Sam Williams was . . . going to run for office again and he had not come forward with any of his felony records that he promised the executive board . . . he was going to provide." Thereafter, Mickelson "contacted a company that specifically had certain private investigators do background investigations" and requested that it check public records for information regarding Williams. On or about August 10, he received a document, General Counsel's Exhibit 5, containing information pertaining to Williams' arrest and conviction record, from the company, with which he had contracted to perform the investigation. Said document reads as follows:

Investigation: Samual (nmi) Williams
Dob: 08-14-55
SSN: 545-06-3934

A confidential source within law enforcement ascertained through their computer system the following information, based on the limited information provided by your office.

Subject: SID# 5724600
Oregon Correctional Institution #4387
Lka: 4616 S.E. Milwaukie Avenue
Portland, OR
No active driver's license

Subject was ticketed and given a number issued at the Time of the ticket for police identification purposes

ITEM #1 February 3, 1981
Multnomah County
Arrested by Portland Police Bureau
Robbery III
Sexual Abuse I
Sodomy I

summer of 1998 during which she complained about the Williams incident, saying he ". . . cussed her out using the F word, using the B word and . . . just embarrassed her and infuriated her" in front of several operators. According to Norton, she was insistent that, given the children in our system, "our organization" must discharge him. Also, Norton recalled seeing an E-mail message, from Joe Mickelson, a shop steward, to Dave Martin, PTS's chief of transit public safety, written the day after the Williams-Mullennix incident, in which Mickelson described Williams as "jumping into Fran's face and calling her an Fing bitch," stated that another operator was forced to intervene and "keep Sam from making contact with [her]," and termed Williams "a loose cannon."

[28] In his daytimer notation for a July 1 conversation with Mullennix, regarding Williams, Norton wrote, "complaint file." According to Norton, this reference was to passenger complaints regarding operator attitudes, late buses, and the like. Each is investigated to determine its validity. Mullennix testified that she spoke to Norton regarding customer complaints—"We were discussing what they called . . . the top ten hit parade of 10 operators with the most complaints and I was told Mr. Williams had 175 complaints.

[29] Hanley testified that Norton "essentially advised me that information had come to him . . . suggesting . . . Williams had a criminal background . . . and that quite possibly . . . resulted in a falsification of his employment application. "Hanley, in turn, directed David Martin, the chief of transit public safety, to work with a private investigator, who is a subcontractor of PTS, to uncover the truth of what was alleged.

[30] Charles Weigand testified that, one day in early August, he was sitting across her desk from Mullennix in her office, when a call came from Norton. According to Weigand, Mullennix answered and said ". . . that she could not understand why the company was unable to turn up any information about Mr. Williams . . . because it was known that [he] did have a legal problem years ago. . . . I believe . . . she asked whether it was a possibility that he may be using an assumed name . . . ." Then, "there was some discussion about Mr. Martin['s] . . . inability to find the information." A day or two later, Weigand testified, he was again in Mullennix's office when a telephone call came from Phil Hanley. During their conversation, Weigand heard Mullennix say ". . . that she had already talked to Ron Norton about it and she understood that they weren't able to find any information on it and . . . [she] couldn't understand why . . . ."

[31] Apparently, sometime in July, PTS received a complaint from the parents of a 12-year old girl, who alleged that, while a passenger on a bus, driven by Williams, he had called her a "cutie-pie" when she entered the bus and that, when she asked to get off the bus, Williams said, "We need to spend some time together." Whatever was alleged, according to Norton, "It was investigated and it was considered to be a non-issue by . . . our security group and our ops group." He added that no discipline was given to Williams over the complaint.

According to Mullennix, during her conversation with Norton regarding the top ten hit parade, the latter seemed concerned about two complaints involving Williams—the problem with the 12-year-old girl and an allegation that Williams pulled a gun on a security officer. Mullennix told Norton she "doubted" the latter ever occurred.

[32] Mullennix specifically denied directing Mickelson to obtain information regarding Williams' past criminal activity. However, she conceded that he did do so, and, when asked why Respondent needed this information, she answered, "I was very confused for a couple of different reasons. I had gotten a voters' registration from sent out to all of the locals and on that form Mr. Williams was showing as a registered voter. And I thought . . . I wonder what's going on. Maybe his rights were restored."

CONVICTED: All of above three charges
Incarcerated at Oregon State Prison 10-09-81
Paroled 09-04-85

On receipt of the information, contained in the document, as Mullennix was away on union business, Mickelson telephoned Weigand and "I made the mistake of telling him the information" but did not show him the document. Two or three days later, Mullennix returned, and, according to Mickelson, "I believe I talked to her on the phone," and "I gave her the information that I'd found . . . . she appreciated the information that I got." Mickelson added that the price of the background investigation of Williams was $285.00, an expense for which he decided not to seek reimbursement. While failing to specifically deny having received Williams' arrest, conviction, and incarceration record information verbally from Mickelson, Mullennix admitted only seeing the identical information, as contained in General Counsel's Exhibit 5, on a similar document, which had been brought to Respondent's office by Mickelson in August. Charles Weigand testified that, in August, he received a telephone call at home from Mullennix during which she "stated that they had the information on Mr. Williams. . . . I was told that the information was gained from Mr. Mickelson," and Mullennix then said that the conviction involved "a rape" and, perhaps, "sexual misconduct and robbery." She concluded, saying that such "would be enough to dismiss Sam from [PTS]."

As stated above, during July and early August, PTS experienced futility in locating any conviction and incarceration information, concerning Williams. Then, according to Ron Norton, in August, during a telephone conversation with Fran Mullennix about PTS's futility in locating information, relating to Williams' criminal background, ". . . I got from her . . . to try Portland, Oregon . . . ." Phil Hanley, who testified that, earlier, Norton's information caused him to seek information, regarding a possible Samuel Williams' criminal conviction, in California and Washington, further testified that, in mid-August, Norton eventually told him to look in Oregon, ". . . and that's where we ultimately found it." Hanley reported PTS's private investigator's discovery to Norton, and the latter, in turn, telephoned Mullennix, telling her "that we had, indeed, found the information that she had told us about and that, after consideration of the information we compared it to . . . [Williams'] application" and decided "to terminate [his] employment." Charles Weigand testified that, a week or two after the first occasion, during which he overheard her speaking to Ron Norton, he again was in Mullennix's office when Patricia Morton announced that Norton was on the telephone. However, other than recalling that Mullennix appeared to be acknowledging whatever information Norton related to her, he could not recall her saying anything.[33]

[33] This is the second of two telephone conversations between Mullennix and Norton, during which, Weigand testified, he was present. In GC Exh. 7, a document prepared by Weigand detailing events here, he wrote that he overheard "several" such conversations between Mullennix and Norton.

Alleged discriminatee Williams testified that, on August 14, he received the following anonymous document, General Counsel's Exhibit 11, enclosed in an envelope with no return address, in the mail:

WE KNOW WHO YOU REALLY ARE SAM WILLIAMS!

Investigation: Samuel (nmi) Williams
Dob: 08-14-55
SSN: 545-06-3934
Subject: SID# 5724600
Oregon Correctional Institution #43874
Lka: 4616 S.E. Milwaukee Avenue
Portland, OR
No active driver's license
Subject was ticketed and given a number issued at the
Time of the ticket for identification process
Item #1 February 3, 1981
Multnomah County
Arrested by Portland Police Bureau
Robbery III
Sex Abuse I
Sodomy I
Convicted: All of above three charges
Incarcerated at Oregon State Prison 10-09-81
Paroled 09-04-85

According to Williams, he "dropped" the document, which his wife believed had been sent anonymously by Mullennix,[34] on his desk, ". . . and it went in the bottom of my desk drawer."[35] Denying any knowledge as to who sent the document to him, Williams assertedly made no connection between it and his discharge—"none whatsoever." As to who mailed the document to Williams, Joe Mickelson, who received a virtually identical document, on which Williams' arrest, conviction, and incarceration record in the State of Oregon, was printed, from an investigator, denied providing Williams with a copy of General Counsel's Exhibit 5; however, Charles Weigand testified that, in August, Mickelson told him he had sent Williams information about his criminal conviction. Mullennix denied instructing Mickelson to send the information to Williams or anyone else.

The record establishes that, besides mailing the document to Williams , presumably the same individual or group left a copy of General Counsel's Exhibit 11, in a plain brown envelope, on David Martin's desk in the PTS offices.[36] According to Martin, at the time, he was not aware whether the investigation into Williams' alleged criminal background remained "active" as "we had done several checks . . . and nothing ever proved out."[37] Therefore, he immediately showed the document to Phil

[34] Williams testified he believed she was not "bold" enough to do such a thing.

[35] In his pretrial affidavit, Williams stated that he threw the document in the trash; during redirect examination, Williams stated, "I really thought I had thrown the letter away," but "it was just in the bottom of my desk."

[36] Mullennix denied being the person who left the document on Martin's desk.

[37] Martin added that, without the document, the investigation into Williams' past criminal conduct had "pretty much hit a dead end."

Hanley, who "asked me to investigate it." Then, "I contacted the office of our [investigator] and passed the information on to him to see if he could verify it or not. Phil Hanley contradicted Martin as to the significance of General Counsel's Exhibit 11 to the investigation into Williams' criminal background. According to him, when Martin came to him with the document, "we were already investigating to try to locate the alleged criminal record. We were already doing that when the document appeared." Unlike Martin, Hanley, who does not "get concerned or excited about things that are anonymous," said he "can't say" that the document steered the investigation towards Oregon but did aver "it did not play a part in that . . . process."

Whatever caused PTS to concentrate its investigation of Williams in the State of Oregon, its investigators immediately focused their efforts there and were able to supply PTS with "a substantial packet of material" relating to Williams' criminal proceedings in that state. Martin then compared this to information on Williams' employment application.[38] Analysis of General Counsel's Exhibit 14, Williams' employment application for an operator position with PTS, which he signed and dated July 17, 1991, discloses that, in Space 4, under employment experience, Williams wrote that, from April 1977 through February 1985, he worked for "L & M Pickle Prod," located on 99th Street in Inglewood, California, as a route driver.[39] According to Phil Hanley, "we noticed that during the time frame that was listed as the last spot for an employment record . . . we noticed . . . a document that had indicated that Mr. Williams . . . had been incarcerated for part of that time frame. So . . . we knew . . . [his application] had to be wrong." With regard to his work for the above-stated employer, Williams explained that L & M Pickle Products is based in Los Angeles, California[40] and is not a "very" large company; that, while in prison, he had a leave of absence from L & M Pickle Products; that, upon obtaining his work release, he returned to work for L & M Pickle Products at its facility in northeast Portland;[41] and that, rather than receiving a regular paycheck, he was paid for his work in cash by L & M Pickle Products. Hanley testified that PTS was unable to find any documents, establishing that L & M Pickle Products ever did business under said name or any other name in either California or Oregon, and, thus, was unable to substantiate whether such an entity ever existed.

Williams,[42] testified that, while driving a route in Phoenix on Monday, August 31, Dave Martin contacted him, by radio, and ordered him to report to Phil Hanley's office immediately. Another operator replaced him, and Williams reported to Hanley's office, finding Hanley, Martin, R.V. Young, and Joe Brennan waiting for him.[43] Hanley began, telling Williams that "rumors" had reached PTS concerning him and possible felony convictions and asking if he had anything to say about the validity of the rumors.[44] "And with that, I told him that I did have the conviction, what it was and when it was." Hanley then produced some "paperwork," including Williams' employment application, and accused him of fabricating on the application regarding being employed at the same time he admittedly was serving a prison sentence in Oregon. Williams denied Hanley's accusation and requested time to prove that he had, in fact, been working for L & M Pickle Products during the time period of his incarceration at the Oregon State Penitentiary. Ultimately, "we agreed that we would reconvene [within] . . . 30 days to discuss this. In the meantime, I would be on suspension."[45]

[38] In accord with the instructions on the employment application form, Williams answered "no" to the question concerning any felony convictions within the past seven years, and Hanley stated that Williams' 1981 felony conviction was "not" the reason for his discharge.

[39] With regard to Williams' testimony that he was out of jail on a work release program during a portion of his prison term, I note that the certified records from the Oregon Department of Corrections fail to mention that Williams was out of jail on a work release program for any time period. Moreover, his testimony on this point and other record evidence were contradictory. Thus, during direct examination, he stated that he served "thirteen months" in the Oregon State Penitentiary and, then, he was given the "opportunity" for a work release. However, in October 1997, he told Respondent's executive board that he only served 14 months of his entire prison term—"I did eight months in and 6 months on work release." Also with regard to this work release program, Williams was allowed to reside in an apartment and merely report to someone once a week. Further, security for the program was so lax that, notwithstanding continuing to serve a sentence for a felony conviction, Williams was able to take a vacation from the work release program, his nominal prison sentence, and attend the 1984 Olympic Games in Los Angeles, California.

[40] He testified that "I actually started working for L & M in the Los Angeles area."

[41] Apparently, L & M Pickle Products is large enough to be a multistate corporation, with places of business in California and Oregon.

[42] There is no specific record evidence that Williams was aware that Respondent had become privy to his State of Oregon felony conviction and incarceration records. In this regard, Charles Weigand testified that, in August, while he was in Respondent's office, Fran Mullennix told him that "I was not have any contact with Mr. Williams." Mullennix conceded that such a conversation occurred but placed it a context of Weigand being upset because Williams and him had been arguing with him "over I don't even know what . . . and he was really upset." Consequently, ". . . I simply told him `If he's causing you a problem, you don't have to talk to him. Refer him to me. I will deal with him." Weigand denied that this was the context of Mullennix's admonition. Patricia Morton, who, Weigand recalled, was a witness to what Mullennix told him, denied being present at a time when Mullennix instructed Weigand not to have contacts with Williams and recalled an occasion, shortly after Weigand's termination by PTS, when he complained that Williams was "screaming and hollering" at him during a telephone conversation.

[43] Fran Mullennix testified that she received a fax of a letter from PTS, stating that it wanted to schedule a meeting with Williams concerning his "work history" and did not dispute August 31, as the date. Thereafter, she telephoned Hanley but did not seek details about the meeting as "I knew they would be provided at the meeting." Rather than attending herself, she then assigned Young and Brennan, an executive board member, to attend as ". . . I believe Mr. Williams had asked that no union representation be there" and ". . . it would aggravate him more . . . ."

Williams denied, in his mind, seeing any connection between GC Exh. 11 and PTS's investigation into his past criminal activity—"none whatsoever."

[44] In his April 25, 1999 appeal of the Regional Director's dismissal of his unfair labor practice charges, Williams wrote to the General Counsel of the Board, "I couldn't understand why after seven years the company . . . would be reviewing my application. . . ,"

[45] Young testified that Williams requested 30 days in order to obtain evidence, which would "explain everything" but that the PTS representatives would not agree, saying they would only give him what they

Two days later, after being unable to locate any information about the past or current status of L & M Pickle Products, Williams was informed by Hanley that PTS had obtained "new information" and that a hearing would be held on Friday, September 4, in order to discuss "this." Because "I did not have any evidence, I wasn't given time," and "I didn't think it was fair." Williams failed to attend the meeting. Previously, he had informed Respondent of his intent and requested that no representation be provided for him. Nevertheless, on September 4, R. V. Young attended the scheduled meeting and presented to Hanley a note from Mullennix, requesting that the "hearing" be postponed in order to permit Williams to obtain the information for which he was searching. Hanley refused Mullennix's request, and a truncated disciplinary proceeding was held. Thereafter, by a letter, dated that day, Hanley advised Williams that, as he had given PTS "false and misleading information" on his employment application,[46] PTS had decided to terminate his employment as of September 4.

Williams requested and received grievance forms from Respondent and, on or about September 10, filed a grievance over his discharge. On September 11, Respondent's attorney wrote a letter to Williams, requesting that he provide the former "with records from L & M Pickle Products showing that you were working for that company during the dates reflected in your employment application" and informing Williams that, whether or not the company remained in business, he would be able to obtain records from the Social Security Administration and the Internal Revenue Service showing the years he worked for L & M Pickle Products. Also, on behalf of Respondent, the attorney requested that Williams execute a form, authorizing PTS to release all documents in its possession, upon which PTS relied to support his discharge. The next day, Williams wrote to Respondent's attorney. With regard to the release of documents, he stated:

> First, it is my belief that someone provided the company with the false information they used in my termination. Although I can't prove who and don't want to accuse anyone, I feel if the documents are released to the union they may be `sanitized' prior to release to both my records and the union at large. My problem didn't start until two weeks after I questioned the leadership of our local.

Continuing, Williams added that he did not believe PTS would resolve the grievance prior to arbitration as "the company is counting on the unions (sic) strong dislike for me personally as a reason the union will not pursue this issue past two party." He added that he was in the process of obtaining evidence regarding his prior employment.

The matter of PTS's release of the information, which it had obtained during its investigation of Williams, arose again at Respondent's regularly scheduled monthly membership meeting, which was held on or about September 19. According to Fran Mullennix, "[Williams] told me that he did not want the information released to the union. He claimed that the union had provided documentation to the company to cause his termination and if we got hold of the file we would . . . sanitize it."[47] Eddie Banks, who is an operator for PTS and who has been a shop steward for Respondent, corroborated Mullennix, testifying that he was at this membership meeting on a Sunday night, that 50 other employees were present, and that "Sam was threatening charges against Fran for giving information to the company that caused him to be fired. And he was pretty adamant about it. He was pretty upset." According to Mullennix, after Williams made this comment, she reached an agreement with him—that they would meet on September 23, at the gate to the garage and go to Hanley's office, and Williams would take whatever documents he needed to support his position. On September 23, however, Williams informed Mullennix that he would be unable to meet that day, and they agreed to meet 2 days later in order for Williams to obtain the necessary information from PTS. Then, on September 25, by fax, Williams informed Respondent that he ". . . no longer wish[ed] to pursue my grievance against Phoenix Transit" and withdrew his grievance against PTS. Williams specifically denied stating at a membership meeting that he believed Respondent had been responsible for informing PTS about his prior criminal record.

Alleged discriminatee Williams contends that he did not learn what he believes actually occurred until a December 11 telephone conversation with Charles Weigand.[48] According to Williams,[49] Weigand "told me that he knew why I was terminated and I asked why. He said, because Fran did it. . . . and he began to tell me, he said that Fran wanted me out of the way. That's the exact term that he used. He also said that Fran hated me. She was afraid that I was going to run for office and that she had gotten Joe Mickelson to do an investigation to get paperwork on my conviction so that they could get me fired." Subsequently, Weigand gave Williams a copy of General Counsel's Exhibit 7, Weigand's version of events.. Despite his conversation with Weigand and his receipt of Weigand's statement, Williams delayed in filing the original unfair labor practice charge here until March 17, 1999. There is no record evidence as to the reason for such.

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considered to be "enough time." Also, according to Young, on behalf of Respondent, he requested PTS's entire file on Williams' past misconduct; however, ". . . Williams said that he would prefer . . . that these documents were not given to the Union." Williams did not dispute this latter point.

[46] Hanley noted that the period of time, during which Williams "claimed" he was employed by L & M Pickle Products conflicted with Oregon prison records, which indicated that he had been incarcerated during a significant portion of that time period, and that, at a bail reduction hearing, rather than L & M Pickle Products, Williams asserted his "current" employer was Jantzen, Inc., a company for which he assertedly had worked for 14 months.

[47] Mullennix said Williams directed his accusation against "me personally and other officers."

[48] Weigand admitted being part of a faction of Respondent's membership, which, January 1999, was actively involved in attempting to have Mullennix removed from her office as president/business agent of Respondent.

[49] In his appeal of the Regional Director's dismissal of his unfair labor practice charges, Williams concedes that, as of his letter to Respondent's attorney, dated September 11, ". . . I believed the union had something to do with my termination." However, he averred that such was only a "`gut feeling'" with no underlying supporting evidence.

*B. Legal Analysis*

Initially, I shall consider Respondent's affirmative defense that the alleged unfair labor practices here occurred more than 6 months prior to the filing of the instant original unfair labor practice charge on March 17, 1999, and, thus, were outside the 6-month statute of limitations as established by Section 10(b) of the Act. Section 10(b) of the Act provides that "no complaint shall issue upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The alleged unfair labor practices here occurred during July and August 1998—more than six months preceding the filing of the above original unfair labor practice charge. There is no dispute as to the applicable law in this area. Thus, Section 10(b) of the Act is a statute of limitations, is not jurisdictional in nature, and is an affirmative defense, which must be pleaded and which, if not timely filed, is waived. *R. G. Burns Electric*, 326 NLRB 440, 446 (1998). The "10(b) period" commences— or, put another way, the statute of limitations is tolled—only at the time when a party has clear and unequivocal notice of a violation of the Act or where a party, in the exercise of reasonable diligence, should have become aware that the Act has been violated. *Bryant & Stratton Business Institute*, 327 NLRB 1135, 1145 (1999); *R.G.Burns*, supra, at 440–441; *Carrier Corp*., 319 NLRB 184, 190 (1995); *Duke University*, 315 NLRB 1291, 1295 (1995); *Oregon Steel Mills*, 291 NLRB 185, 192 (1988). The Board also has expressed this point of law in other words—. "the Section 10(b) period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice." *Concourse Nursing Home*, 328 NLRB 692 694 (1999). However stated, it is clear that the burden of proving actual or constructive knowledge "rests squarely" on the party asserting it. *R. G. Burns*, supra, at 446. Applying these legal standards to the instant fact matrix, I believe, Respondent has adduced evidence, establishing that, while he may not have had clear and unequivocal notice of Respondent's alleged unfair labor practices prior to December 11, 1998, Williams is chargeable with constructive knowledge of said unfair labor practices no later than September 11, by dint of his failure to exercise reasonable diligence immediately on becoming suspicious of Respondent's involvement in his discharge by PTS.

The following factors are relevant to my conclusion. First, at Respondent's October 20, 1997 executive board meeting, Williams[50] fully disclosed the facts regarding his State of Oregon felony conviction and incarceration to members of the executive board, including Respondent's officers. Next, on July 1, in the presence of other operator/members in a room at a PTS garage, Williams, if credited, confronted Mullennix and informed the latter of his intent to oppose her and seek election to the position of president/business agent in Respondent's next general membership elections. Third, 6 weeks later, on August 14, Williams received a copy of General Counsel's Exhibit 11, the anonymous "We know who you really are Sam Williams" document, and he admitted his wife immediately believed Mullennix had either created the document and sent it to Williams or directed its creation and mailing to him. Fourth, 2 weeks later, PTS notified Williams of its intent to discipline him based on discrepancies on his employment application, which had been uncovered during PTS's investigation of his criminal record. On this point, given his own estimation that such was a nonissue in August 1998, I found incredible the alleged discriminatee's assertion that he saw no connection between his receipt of General Counsel's Exhibit 11 and PTS's unanticipated investigation of his past criminal record.

While perhaps not an exact roadmap to the unfair labor practices, certainly when considered in their entirety, the foregoing factors reasonably would engender suspicion that Respondent was the supplier of the information, which directly resulted in Williams' discharge by PTS, to the latter. Indeed, Williams himself conceded having a "`gut feeling'" that Respondent was the cause of his termination, stating this inferentially in his September 11 letter to Respondent's attorney[51] and clearly at Respondent's September membership meeting[52] 9 days later.[53] Nevertheless, he failed to act to establish or controvert what he believed in his "gut" by questioning any officer or representative of Respondent or any management official of PTS or by processing the grievance over his discharge. In this regard, the facts of this case are virtually identical to those of the Board's decision in *Electrical Workers IBEW Local 25 (SMG)*, 321 NLRB 498 (1996), wherein Section 10(b) was at issue as the unfair labor practice charge was filed approximately 15 months after the alleged unfair labor practice. Said decision involved an allegation that a union had unlawfully bypassed an individual on its out-of-work list and dispatched another person who was a member of the union's executive board. The administrative law judge, whose decision was adopted by the Board, found that, after conversations with three other union members more than 6 months prior to the filing of the unfair labor practice charge, the alleged discriminatee had been "put on notice" that the union had bypassed her for a job referral and dispatched one of its officers to a job, conduct which constituted the alleged unfair labor practice. While the alleged discriminatee denied that she believed what she heard, the administrative law judge further found that, at least, she "harbor[ed] a suspicion" the referral to the executive board member had, in fact, occurred and that, other than telephoning the union "a couple of times," she failed to seek out officials of the union in order to

[50] Samuel Williams' demeanor, while testifying, generally was that of a frank and veracious witness; however, this is not to say that I found him, at all times, to be entirely forthright.

[51] While initially stating "someone" provided information to Respondent, Williams revealed his true thoughts when, immediately thereafter, he stated his belief that Respondent would edit records, which he obtained from PTS, prior to release to the membership and that his "problem" did not begin until he questioned the leadership decisions of Respondent's officers.

[52] While I harbor significant doubts as to the credibility of Mullennix, inasmuch as she was corroborated by Eddie Banks, who, in all aspects, was an honest witness, I rely on Mullennix that Williams accused her of informing PTS about his criminal record.

[53] While I recognize that this membership meeting fell within the Section 10(b) period, it strains credulity to believe that Williams experienced some sort of epiphany, regarding Respondent's involvement, during the 9 days between his letter to Respondent's attorney and the membership meeting.

attempt to confirm her suspicion immediately after speaking to the three union members. Although her suspicion was eventually confirmed during the Section 10(b) period, the administrative law judge concluded that ". . . phoning the union a couple of times did not satisfy her obligation to exercise `reasonable diligence' in confirming [what she had been told],"[54] and that, therefore, the Section 10(b) period commenced at that point. Id. at 500. Likewise, there is no record evidence here that, immediately after his discharge on September 4, Williams questioned any officer or agent of Respondent or management official of PTS to confirm or refute his suspicions about Respondent's involvement in his discharge—suspicions which were evident in his September 11 letter to Respondent's attorney and in his statements at Respondent's monthly membership meeting 9 days later. Moreover, the instant matter is distinguishable from a Board decision, on which counsel for the General Counsel relies—*R. G. Burns Electric*, supra. Therein, concluding that the Section 10(b) statute of limitations had not been tolled as early as asserted by the respondent, the Board refused to impute constructive knowledge to the union notwithstanding that its business agent had exercised "reasonable diligence" by not only keeping the respondent's worksite under surveillance and documenting his observations but also by "using his inside sources . . . to provide him with the answers" regarding the respondent's utilization of new hires. In so concluding and rejecting the respondent's contention, the Board noted that the business agent "was unsuccessful" in his efforts and that the Union obtained clear and unequivocal notice only by "chance." Id. at 440–441. In contrast, of course, Williams, here, did absolutely nothing to confirm or refute his supposition regarding the labor organization's involvement in his discharge, and, in my view, given such clear indications of unlawful conduct as exist on this record, "reasonable diligence" by Williams required something more than merely waiting for divine revelation of clear and unequivocal notice (actual knowledge) of Respondent's culpability—a "chance" telephone call from Charles Weigand. Accordingly, on these facts, I believe, exercising "reasonable diligence," Williams should have known Respondent had direct involvement in the investigation by PTS into his past criminal activity by, at least, September 11;[55] therefore, he was required to file any unfair labor practice charge related to Respondent's acts and conduct within 6 months thereafter. *Electrical Workers Local 25*, supra; *Moeller Bros. Body Shop*, 306 NLRB 191 (1992); *John Morrell & Co.*, 304 NLRB 896 (1991).[56]

Counsel for the General Counsel asserts two other reasons why the Section 10(b) statute of limitations did not toll until Williams obtained actual knowledge of Respondent's alleged unlawful acts and conduct here in mid-December 1998. First, she relies on the equitable doctrine of fraudulent concealment. *Benfield Electric Co.*, 331 NLRB No. 77 (2000); *Brown & Sharpe Mfg. Co.*, 312 NLRB 444 (1993); *John Morrell & Co.*, *supra*. Pursuant to this doctrine, initial set forth in the Supreme Court decision, *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), "if a party has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on [its] part, the bar of the statute does not begin to run until the fraud is discovered". *Brown & Sharpe*, supra, at 444. Regarding the character of the evidence concealed, in *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977), the court held that it is the deliberate concealment of "material facts," which tolls the federal statute of limitations until the injured party ". . . discovers or with due diligence should have discovered the basis for the lawsuit." *Brown & Sharpe*, *supra*. Further, in *Benfield Electric*, supra, at slip. op. 2, "the Board noted that it ". . . has held that three critical elements must be present in order to toll the 10(b) limitations period. Those elements are (1) deliberate concealment has occurred; (2) material facts were the object of concealment; and (3) the injured party was ignorant of those facts." Contrary to counsel for the General Counsel, based on the record as a whole, I have previously concluded that, in failing to attempt to question officers or representatives of Respondent or management officials of PTS regarding his suspicions of Respondent's role in his discharge, Williams failed to exercise "reasonable diligence." Moreover, I do not believe that Respondent deliberately concealed any of the material facts from Williams. In this regard, I found Patricia Morton to have been a more credible witness than Charles Weigand and do not believe Mullennix's admonition that Weigand not speak to Williams occurred in a vacuum. Also, it is likely that, if he had questioned Respondent's officers, Williams merely would have been met with denials, and "the denial of misconduct by a respondent . . . is not . . . an act of concealment." *Benfield Electric Co.*, *supra*. In these circumstances, I find counsel for the General Counsel's contention that fraudulent concealment has occurred here to be without merit.

Next, citing *A & L Underground*, 302 NLRB 467 (1991), counsel argues that the instant original and first amended unfair labor practice charges should not be time-barred as Williams' late filing was the result of the ambiguity of Respondent's acts and conduct. Counsel's reliance on this decision is misplaced. Thus, *A & L Underground* is a contract repudiation case in which the administrative law judge found that, pursuant to the Board's so-called "continuing violation" theory, the fact that the unfair labor practice charge was not filed within 6 months of the respondent's initial clear repudiation of a collective-bargaining agreement would not bar the unfair labor practice charge when said charge was predicated on the respondent's continuing failure, within the Section 10(b) period, on the un-

[54] The likelihood of a confession by a union official appears not to have been a determining factor. What was significant was that the charging party made no effort to inquire.

[55] The import of the Board's decision in *R. G. Burns Electric*, supra, is clear. Given Williams' utter lack of diligence, it is no matter that inquiries to officials of either Respondent or PTS may have been unavailing.

[56] Counsel for the General Counsel relies on another Board decision—*Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995 (1986); however, as there is no record evidence that Respondent engaged in any activities to deceive Williams as to its role in his discharge, said decision and similar ones are distinguishable. In any event, Williams had another source of information—PTS, and there is no record evidence that he spoke to any PTS official regarding the reason for its investigation of his criminal record.

ion's demand, to abide by the agreement. Id. at 467. In its decision, the tenor of the Board's decision is a repudiation of this continuing violation theory as it was applied to clear contract repudiation cases, with the Board holding that the long-standing rule, governing the commencement of the Section 10(b) period, should be applied. While it is true that the Board stated that "the only parties against whom the bar might be a hardship—those whose delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party—are not barred by our holding," in context, the Board's phrase was meant as support for its assurance that it ". . . was not placing any hardship on the party challenging the repudiation." Id. In other words, the Board appears not to have been establishing a general rule for the tolling of the Section 10(b) statute of limitations in all cases. In any event, noting that he gained actual knowledge of Respondent's asserted perfidy in December 1998, there is no record evidence here, explaining Williams' delay until March 17, 1999, in filing the original unfair labor practice charge.

## CONCLUSIONS OF LAW

1. PTS is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(2), (6), and (7) of the Act.

3. Section 10(b) of the Act bars the filing of the instant original and first amended unfair labor practice charges as Respondent's alleged unlawful acts and conduct occurred more than 6 months prior to the filing of said unfair labor practice charges at a time when, with the exercise of reasonable diligence, the charging party should have been aware of the existence of the alleged unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I make the following recommended

## ORDER

It is ordered that the amended complaint be dismissed in its entirety.

Dated: June 22, 2001